

**Lavan Hotel Corp. d/b/a Hotel Lafayette and
Painters District Council No. 4 and Eugene Ed-
wards. Cases 3-CA-10041 and 3-CA-10050**

May 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

On December 28, 1981, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lavan Hotel Corp. d/b/a Hotel Lafayette, Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except the attached notice is substituted for that of the Administrative Law Judge.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We have further considered Respondent's contention that the Administrative Law Judge's findings of fact evidence bias. We have considered the record and the attached Decision and reject this allegation.

In the absence of an exception thereto, we adopt, *pro forma*, the Administrative Law Judge's finding that Respondent did not violate Sec. 8(a)(3) and (1) of the Act by refusing to pay employee Edwards the prescribed wage rate for painters under the labor agreement.

Member Jenkins does not agree with the Administrative Law Judge that *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is applicable in cases in which the asserted reason for the discharge is pretextual.

² Member Jenkins would provide interest on backpay required herein in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT grant our employees wage increases in order to discourage them from seeking union membership or engaging in other union activities.

WE WILL NOT layoff or discharge our employees because of their membership in or support for Painters District Council No. 4, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Eugene Edwards immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of wages or other benefits he may have suffered as a result of our discrimination against him, plus interest.

**LAVAN HOTEL CORP., D/B/A HOTEL
LAFAYETTE**

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Buffalo, New York, on August 26, 1981, pursuant to unfair labor practice charges filed by Painters District Council No. 4, herein called the Union,

on October 9, 1980 (Case 3-CA-10041), and Eugene Edwards on October 15, 1980 (Case 3-CA-10050), and an order consolidating cases, complaint, and notice of hearing issued on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 3 of the Board on November 19, 1980. The complaint alleges that Lavan Hotel Corp. d/b/a Hotel Lafayette, herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act, by granting Edwards a wage increase in order to dissuade him from joining the Union, refusing to pay him the wage rate required by the prevailing collective-bargaining agreement, and discharging him because he had joined the Union. Respondent's timely filed answer denied the substantive allegations of the complaint.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a New York corporation engaged in the operation of a hotel, providing residential and nonresidential rental of rooms for lodging, and restaurant and related services in Buffalo, New York. Jurisdiction is not in dispute. The General Counsel's complaint alleges, and Respondent admits, that Respondent annually receives gross revenues in excess of \$500,000 and annually receives goods and supplies valued in excess of \$50,000 which are shipped to it directly from States of the United States other than the State of New York. The complaint alleges, Respondent admits, and I find and conclude that Respondent is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

In October 1978 Mrs. Nguyen Hung, the residential vice president of Lavan Hotel Corporation, executed, on Respondent's behalf, a collective-bargaining agreement with the Maintenance Painters Union (AFL-CIO) Local #1581, affiliated with Painters District Council No. 4 of Buffalo and Vicinity, Brotherhood of Painters, Decorators & Paperhangers of America AFL-CIO. That contract provided for the Union's recognition as exclusive bargaining representative of Respondent's "maintenance employees . . . in the classifications of wallwasher and maintenance painter." It further provided that all employees in those classifications would become and remain

members of the Union on the 31st day following their employment. The contract, which is still in effect, prescribed a wage rate, effective as of March 1, 1980, of \$5.50 per hour for painters.

B. Eugene Edwards' Employment

Eugene Edwards applied for work at Respondent's hotel about July 30, 1980.¹ He was interviewed by Hung and filled out an employment application.² According to Edwards, when he was hired he was told that he would be renovating the sixth floor, plastering ceilings and sidewalls, painting ceilings and trim, and hanging wallpaper. It was, he said, made perfectly clear to him that, if his work were satisfactory, he could join the Union after 30 days of employment. As Mrs. Hung recalls the employment interview, there was no discussion of the Union, its contract, or the acquisition of union membership. Edwards, she said, was hired as a "handyman, houseman" to do such general work as cleaning around the hotel. She denied that he was hired as a union painter. On the application, Edwards had written, to describe the employment he desired, "handyman." Edwards said that Hung instructed him to use that description, and she claims that Edwards had initiated the use of that term. Handyman is not a recognized job category in Respondent's hotel. Edwards was not a member of any labor union at the time that he was hired.

C. Edwards' Work

For about 6 weeks following the start of his employment, according to Edwards, he worked on the sixth floor with Joseph Thomas, a member of the Painters Union and its steward, doing papering, plastering, and painting. In fact, he testified, since Thomas was an elderly man in poor health, Edwards did most of the painting, plastering, and papering work. Later in his employment, he also replastered the wall in the hotel bar. He denied doing any sweeping other than to clean up after the painting and plastering. He did not mop, clean rooms, or polish brass. Neither did he do any electrical or plumbing work. On some occasions, toward the end of his employment, Edwards waxed and buffed the lobby floors. However, for this he was paid separately, as a subcontractor. On one occasion, together with a number of other hotel employees, he pitched in to move material from the ballroom.

Hung did not directly supervise Edwards; his supervisor was the hotel manager, either Lotario or Luan. Hung acknowledged that Edwards worked with Thomas, the painter, and helped him but denied that she ever saw Edwards working with a paint brush. She claimed to have seen Edwards everyday but not to have observed his work on a day-to-day basis. She could not dispute Edwards' testimony that he had plastered the wall in the hotel's bar.

¹ All dates hereinafter are 1980 unless otherwise specified.

² Edwards was reasonably certain but not absolutely positive that the hotel's manager, a Mr. Luan, was present at his interview. Hung testified, without contradiction, that the manager at the time of Edwards' interview was a Mr. Lotario and that Luan was not hired until September. Neither Lotario nor Luan testified herein.

Joe Thomas, who left the hotel's employ for reasons of ill health, was not called as a witness in this proceeding.

D. Edwards' Effort To Join the Union

About September 6, Edwards had a conversation with Hung and Luan. He asked them whether he had completed his 30-day probationary period satisfactorily and what they were going to do about his pay scale. As Edwards testified, Hung told him: "There is really not reason enough to go to the Union, and we really can't afford it because the hotel is in a financial strain, but we could afford to pay you a dollar more." Hung recalled Edwards coming to her with a request for a raise, threatening to quit if his pay was not increased. After discussing the request with Luan, she said, it was agreed that Edwards' pay would be increased \$1 per hour. Mrs. Hung denied that there was any discussion of the Union at that time and further denied telling Edwards that it was not necessary for him to join the Union.

According to Edwards, after about 5 weeks of employment he began to talk to Thomas about getting into the Union. On one occasion, according to his uncontradicted testimony, he overheard Thomas telling Hung of his desire to acquire union membership. Seeing no progress in his efforts to secure membership by dealing through Thomas, Edwards went to the Union's office after work on October 8. He spoke to Michael Wolford, the Union's business manager, about acquiring membership and submitted an application.

E. Edwards' Termination

When Edwards returned to work on October 9, he told Hung that he was now a "full-fledged member of the Painters Union." She did not reply.³ At about 3:30 p.m., Luan took Edwards from the sixth floor to his office and told him that he was being laid off due to a lack of work, that the hotel could not afford to employ two painters, that his work really was not satisfactory, and that Luan did not particularly care for his attitude. Edwards was told that he should be grateful, work harder, and show more allegiance. His work, Luan said, was not up to management's standards. At the conclusion of this meeting, Edwards was told that he would have to take a job as houseman or be laid off. Luan told him to take the next day off to think about his decision. Edwards did not return for the lower-paid position.⁴

In mid-October Edwards, Thomas, and Wolford met with Luan and Hung. Respondent refused to continue Edwards' employment as a painter under the terms of the union contract but offered him the houseman's essentially janitorial job.

According to Edwards, prior to his termination there had been only praise and no criticism of his work. When Edwards and Wolford met with management following his termination, Thomas had told Wolford that Edwards' work was good. Edwards further testified, without contradiction, that, in late September or early October, Luan

had told him that Respondent contemplated renovating the entire hotel. Luan asked Edwards how much paper he could hang in a hour and "approximately how much [he] would have to have to do the job," and said that he would hire a helper when they could proceed.

F. Analysis

While there exists a substantial conflict in the testimonies of Edwards and Hung as to the terms under which Edwards was initially hired, the probative evidence establishes that, in fact, he worked as a painter, plasterer, and paperhanger throughout his brief tenure. Whatever other work he did was incidental to his painting duties or was separately compensated. Edwards so testified and no one who supervised or worked with him on any regular basis was offered to contradict that testimony. Hung's observations of him were too sporadic and of too short duration to warrant the drawing of any contrary conclusion. It is the work which an employee performs, not his job title classification, which determines his unit placement. See, for example, *Sears, Roebuck and Co.*, 222 NLRB 476 (1976).

The probative evidence further establishes that when Edwards sought to exercise his contractual right (and indeed to fulfill his contractual obligation) as a painter to acquire membership in the Painter's Union, he was offered an unacceptable alternative and terminated. Thus, while there had been no objection to his work or his attitude prior to October 9, he was told that both were unacceptable immediately after he announced that he had taken steps to acquire union membership. Management's haste to find fault with him once he acquired standing in the Union, compared with its acceptance of his work and attitude prior thereto, including its compliments of him and its implied promise of substantial continuing work (all uncontradicted) belies any contention that he was terminated for faulty work or because the work he had been doing had run out. See *Highlift Equipment Co., a Division of Highway Equipment Company*, 224 NLRB 918 (1976).

The result remains the same whether the facts herein are viewed as a "pretext" case or as a case involving alleged dual motivation. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). Edwards' union activity, the animus revealed in Luan's references to his attitude, allegiance, and gratitude, and the precipitate nature of his termination establish a strong *prima facie* case. Respondent offered nothing save a claim that he had been hired as a handyman rather than as a painter to rebut that *prima facie* case. Accordingly, I must conclude that Eugene Edwards was offered employment in an unacceptable lower-paying position and was terminated because he sought to exercise his contractual right and obligation to acquire union membership, in violation of Section 8(a)(3) and (1) of the Act.

Similarly, I must credit Edwards' testimony regarding the September 6 request for a wage increase and conclude that Respondent granted Edwards a \$1-per-hour wage increase in order to dissuade him from joining the Union and seeking the full contractual wage rate. In reaching this conclusion I have considered, in addition to

³ This testimony is uncontradicted.

⁴ Hung testified that the contractual wage rate for housemen was \$3.55 per hour.

the demeanor of the witnesses, the fact that Edwards' request came at the appropriate time, very shortly after he had completed 30 days of employment. I have also noted that Respondent granted him a very substantial raise, amounting to nearly a third of his hourly wage. Such a large increase was inconsistent with Respondent's contention that Edwards was merely a utility employee, like a houseman, where the contractual wage rate for houseman was only \$3.55 per hour. The logical explanation for an increase of this size is that Respondent knew Edwards was entitled to more and hoped to dissuade him from seeking the full extent of the increase to which he was entitled.

The General Counsel further alleges that Respondent refused to pay Edwards the contractual rate to which he was entitled because of his union activities or in order to discourage employees from engaging in such activities, in violation of Section 8(a)(3) and (1) of the Act. This refusal may have been a breach or a unilateral change of that contract, but I fail to see how it could constitute a violation of the Act as interference or discrimination in the manner alleged in the complaint. Accordingly, I shall recommend that this allegation be dismissed.

THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged Eugene Edwards, Respondent shall offer him immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges and shall make him whole for any loss of pay he may have suffered as a result of the discrimination against him. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁵

CONCLUSIONS OF LAW

1. By offering employees wage increases in order to dissuade them from joining the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of their statutory rights and has thereby violated Section 8(a)(1) of the Act.

2. By discharging Eugene Edwards because of his union activities, membership, and support, Respondent has discriminated against him in regard to hire and tenure of his employment in violation of Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not engaged in any other unfair labor practices not specifically found herein.

5. Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER⁶

The Respondent, Lavan Hotel Corp. d/b/a Hotel Lafayette, Buffalo, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting employees wage increases in order to discourage them from joining the Union or engaging in other union activities.

(b) Discriminatorily laying off or discharging employees because of their union membership, activity, or support.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Eugene Edwards immediate and full reinstatement to his former job or, if that is not possible, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its place of business in Buffalo, New York, copies of the attached notice marked "Appendix."⁷ Copies of said notices, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).